



October 20, 1999

Ms. Linda Cloud
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR99-2960

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128260.

The Texas Lottery Commission (the "commission") received two requests for information relating to a request for proposals regarding instant ticket vending machines. You request our decision whether portions of the bid proposals are excepted from disclosure under section 552.110 of the Government Code. We assume that you have released the remaining requested information to the requestors.

Pursuant to section 552.305 of the Government Code, we notified On-Point Technology Systems, Inc. ("On-Point") and Interlott Technologies, Inc. ("Interlott") of the requests for information and of their opportunity to claim that the information at issue is excepted from disclosure. On-Point and Interlott responded by asserting that portions of their bid proposals contain trade secrets and confidential commercial and financial information which should be excepted from disclosure under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.¹ Commercial or financial information is excepted from disclosure under the second prong of section 552.110.

¹The Seventy-sixth Legislature amended the commercial or financial prong of section to provide that the information is excepted from public disclosure if there is a demonstration of "specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." October 20, 1999 codified as an amendment to Gov't Code § 552.110). The amendment applies to a governmental body's request for an attorney general decision made on or after September 1, 1999, the effective date of the amendment. Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 36, 1999 Tex. Sess. Law Serv. 4500, 4514 (Vernon).

On-Point contends that its commercial and financial information is confidential under section 252.049 of the Local Government Code, and therefore, is excepted from public disclosure under the commercial or financial information prong of section 552.110. Section 252.049 provides that “[a]ll proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information contained in the proposals are not open for public inspection.” Local Gov’t Code § 252.049(b); *see also id.* § 252.049(a) (“Trade secrets and confidential information in competitive sealed bids are not open for public inspection.”). This section makes specifically public all information in these types of proposals except for information that is determined to be a trade secret or is otherwise confidential by law. Thus, section 252.049 is essentially coextensive with section 552.110 of the Government Code and does not provide any exception to disclosure over and above that provided by section 552.110 of the Government Code. We further note that chapter 252 of the Local Government Code is inapplicable here because chapter 252 governs the purchasing and contracting authority of municipalities. The commission is not a municipality. Because On-Point has not shown that its commercial or financial information is privileged or confidential by statute or judicial decision, the commission may not withhold the information under the commercial or financial prong of section 552.110.

On-Point also asserts that portions of its bid proposal are excepted from disclosure under the trade secret prong of 552.110. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement’s definition of trade secret as

well as the Restatement's list of six trade secret factors. *Id.*² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

We have reviewed On-Point's arguments and the submitted information and conclude that most of the submitted information is excepted from public disclosure under the trade secret prong of section 552.110. We have marked the information that is not excepted as a trade secret under section 552.110, and therefore, must be released.

Interlott contends that portions of its proposal are excepted from disclosure under the trade secret prong of section 552.110. We have reviewed Interlott's arguments and the submitted information and conclude that most of the information Interlott seeks to withhold is excepted from public disclosure under the trade secret prong of section 552.110. However, we do not believe that the information in sections 5.24.1 through 5.24.5 found on pages 129-131 of Interlott's proposal is excepted as a trade secret under section 552.110. Therefore, this information must be released. The commission must also release Exhibit E-7 because Interlott makes no arguments concerning the withholding of Exhibit E-7. Open Records Decision No. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Interlott also asserts that the social security numbers and addresses of Interlott's officers, directors, and key personnel are protected by common-law privacy as encompassed by section 552.101 of the Government Code.³ Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668,

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

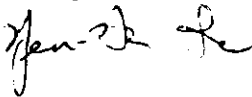
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

³Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). This office has concluded that addresses and social security numbers are not excepted from disclosure under common-law privacy. Open Records Decision No. 455 (1987). However, the social security numbers are confidential if the commission obtained and maintained them pursuant to any provision of law enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 128260

Encl. Marked documents

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